

89-1977

NO. \_\_\_\_\_

Supreme Court, U.S.

FILED

JUN 6 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE SUPREME COURT OF  
THE UNITED STATES OF AMERICA

OCTOBER TERM, 1989

GEORGE J. LEMAK

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

---

VINCENT C. MUROVICH, JR.  
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OCTOBER, 1989



### QUESTION PRESENTED

Whether a conviction for violating 26 U.S.C. 7201 for willfully attempting to evade or defeat the assessment of income tax bars a second indictment for willfully attempting to evade or defeat the payment of those same taxes for the same calendar year by having the ability to pay the taxes in a subsequent year and not so doing?

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IN THE SUPREME COURT OF  
THE UNITED STATES OF AMERICA  
OCTOBER TERM, 1989

GEORGE J. LEMAK

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

George J. Lemak respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit Court entered in this proceeding on April 4, 1990. Petition for Rehearing was denied May 1, 1990.

OPINIONS BELOW

The Opinion of the panel of the court of appeals (A-1) is not reported. The

Decision of the District Court is not reported.

### JURISDICTION

The judgment of the panel of the court of appeals was entered on April 4, 1990 (A-1).

A timely Petition for Rehearing was denied on May 1, 1990 (A-11). Jurisdiction of this Court to review the judgment in question is conferred by 28 U.S.C. Section 1254 (1).

### CONSTITUTIONAL AND STATUTORY

#### PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;...."

2. Section 7201 of Title 26 United States Code provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be



fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

#### STATEMENT OF THE CASE

In January, 1979, Lemak was indicted on seven counts of violating 26 U.S.C. 7201 (three counts of attempting to evade or defeat the assessment of income taxes during the calendar years 1972-1975; and three counts of attempting to evade and defeat a large part of income tax due and owing by signing a false and fraudulent return for the same years). He entered a plea of guilty on all the counts of the indictment and received a one year custodial sentence followed by a five year probationary sentence.

The tax liability for the year 1972 was involuntarily satisfied by payments received through a tax levy on Lemak's assets in 1982 and 1983. On May 12, 1982, Lemak and the Internal Revenue Service arrived at an agreement for the tax liability for the

calendar years 1973-1975 in the amount of \$462,747.44.

On May 2, 1989, Lemak was indicted on two counts of violating 26- U.S.C. 7201 (willfully attempting to evade and defeat the payment of income tax due and owing for the years 1973-1975 by concealing his assets in 1983 and 1984) and one count of violating 18 U.S.C. 371 (conspiracy to defraud the United States in the collection of revenue for the same calendar years).

Timely pre-trial motion filed by Lemak to dismiss the indictment based on double jeopardy was denied (B-1).

A jury found Lemak guilty of all three counts and he subsequently received a custodial sentence of two years to be followed by a three year probationary sentence.

The facts established at trial on the second indictment are undisputed. Lemak's co-conspirator testified that in 1983 and 1984 he made 10 to 15 sales of silver bars at prices ranging between \$10,000 and \$60,000 per

sale. In 1984 Lemak transferred cash in the amount of \$50,000 to a shipbuilding company in Wisconsin in which he was a shareholder. In 1983 and 1984 he wired approximately \$83,000 through Western Union to the shipbuilding company in Wisconsin. In 1983 he sent \$160,000 to \$170,000 in cash to a friend in North Carolina to help her pay her tax delinquency on a complicated real estate transaction which he allegedly had an interest.

The second indictment charged Lemak with having the financial ability to make payments on the 1973-1975 tax liability during the years 1983 and 1984 and that he evaded the payment of those back taxes by concealing his assets. During the years 1983 and 1984, other than his admitted indebtedness to the Internal Revenue Service, there was no statutory requirement that he make payments on his tax indebtedness. During that period, the Service made no demands for payment; issued no levies; and, made no efforts to collect from Lemak.

On appeal, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court.

The Court of Appeals concluded that since there was no dispute of the facts in this case, its review of the District Court's interpretation and application of the legal precepts applicable to a determination of double jeopardy is plenary Dent v. Cunningham, 789 F.2d 173, 175 (3rd Cir. 1986).

In arriving at its decision, the Court of Appeals relied on Sansome v. United States, 380 U.S. 343, 354 (1965) which held that Section 7201 contains two separate and distinct offenses "willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax." (Emphasis in original) (A-6 ).

The Third Circuit had not previously addressed the double jeopardy issue involved in Section 7201 and thus relied on Cohen v. United States, 297 F.2d 760 (9th Cir. 1962),

cert denied 369 U.S. 865 (1962) where a second prosecution similar to the within case was not barred by the double jeopardy clause (A-6 ).

In Cohen v. United States, supra, Cohen was convicted in 1951 of willfully evading the assessment of a tax for the years 1946 - 1948.

Several years later Cohen was charged and convicted of attempting to evade the assessment of a tax for a period in which he filed no tax returns, and for willfully attempting to evade the payment of taxes for a period in which tax liability had been determined, but not paid - that period included the years of the previous indictment as well as prior and subsequent years and they were all contained in one count of the indictment. The Cohen court rejected the double jeopardy argument stating that the subsequent indictment and conviction involved activity that transpired during a period of time not encompassed in the first indictment.

The Court of Appeals in this case disposed of the double jeopardy argument by

finding that Lemak's first indictment involved attempting to evade the assessment of a tax for activity that occurred in the 1970's while the second indictment involved totally separate efforts in the 1980's to conceal an ability to repay the tax liability due for the years 1973 - 1975 (A- 7 ). The court concluded that in spite of Lemak's contention that the two indictments were interrelated they constituted two separate offenses because the indictments covered activity of two different time spans (A- 8 ).

#### REASONS FOR GRANTING THE WRIT

THE FEDERAL QUESTION HEREIN HAS NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS COURT.

As set forth in the Statement of the Case, this Court in Sansone v. United States, supra held that Section 7201 of Title 26 of the United States Code contains two separate and distinct offenses -- "willfully attempting to evade or defeat the assessment of a tax as

well as the offense of willfully attempting to evade or defeat the payment of a tax". However, this Court has not settled the important question of whether a conviction under Section 7201 of willfully attempting to evade the assessment of a tax bars a subsequent prosecution of willfully attempting to evade the payment of a tax when both offenses involved the same tax liability for the same calendar years even though the second offense involved the concealment of assets.

Lemak does not dispute the Circuit's interpretation of Sansome, however, Sansome does not deal with a second prosecution under 7201 involving the same tax liability that was the foundation of the first prosecution.

While 7201 contains two separate offenses, it would also appear that the Government would be required to choose which one to prosecute at the time of the violation.

If the taxpayer filed a return without payment and the assessment of the tax due was made, the Government would be required to

prosecute for evading payment. On the other hand, if no returns were filed or false returns were filed and there was no assessment, the Government would then proceed to prosecute for evading or defeating the assessment of tax.

The anomaly in 7201 is that it appears that the Government can prosecute a taxpayer at one time under both offenses and, if he is convicted of both, he could be sentenced on each conviction even though they both involve the same factual basis. It is unlikely that Congress would have anticipated the allowance of consecutive sentence for violating Section 7201 under both offenses for the same tax period. One of the protections afforded by the double jeopardy clause of the Fifth Amendment is the protection against multiple punishments for the same offense. Ohio v. Johnson, 467 U.S. 493, 498-99 (1984).

Lemak's first conviction was for attempting to evade or defeat the assessment of a tax for the same calendar years that are



the basis of the second indictment. The first indictment set forth the tax liability or delinquency for each year involved. The capstone of the second indictment is evading or defeating the payment of the taxes due under the first indictment during the calendar years 1983 and 1984. Admittedly, the factual basis for the second indictment includes the concealment of assets during the years 1983 - 1984. However, that concealment occurred when there was no demand for payment; no tax levies; and, no statutory obligation to make payments.

The two indictments are so interrelated that the second indictment could not have arisen in the absence of the first indictment.

The nucleus of both indictments is the tax deficiency for the years 1973 - 1975. Without that common denominator neither indictment would exist. The double jeopardy clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a

series of temporal or spatial units. Brown v. Ohio, 432 U.S. 161, 169, 97 Sup.Ct. 2221, 2227, 53 L.Ed.2d 187 (1977).

Even if section 7201 permitted a dual prosecution the convictions surely would merge for the purposes of sentencing. One of the three primary purposes of the double jeopardy clause is the protection against multiple punishment for the same offense. Ohio v. Johnson, supra. That protection "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishment is vested with the legislature, ...the question under the double jeopardy clause where the punishments are 'multiple' is essentially one of legislative intent." (Citations omitted) Ohio v. Johnson, 467 U.S. at 499.

While Section 7201 contains two separate offenses, logic would require that the Government would have to elect which of

the two it would prosecute. Once it makes the election it is barred from proceeding under the other at a later time. Any other interpretation would permit the Government to prosecute a taxpayer for each succeeding year indefinitely where, as in this case, it could establish that the taxpayer was concealing assets. Such power on the part of the Government would subject the taxpayer to multiple punishments for the same offense.

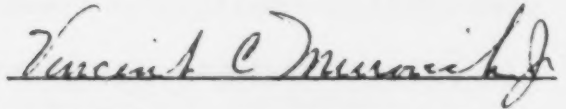
It is inconceivable that Congress would have intended that the Section 7201 offense of willfully evading the assessment of the tax be a singular offense limited to each applicable year; and, on the other hand, permit the offense of willfully evading the payment of the tax due to be a continuing unbridled offense for every succeeding year. Such an interpretation subjects a convicted taxpayer to virtually endless prosecution and multiple punishments.

#### CONCLUSION

For these reasons, a Writ of Certiorari

should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 4, 1990.

Respectfully submitted,

A handwritten signature in cursive script, reading "Vincent C. Murovich, Jr.", written over a horizontal line.

VINCENT C. MUROVICH, JR.  
Counsel for Petitioner

Date: June 5, 1990

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 89-3660

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THE UNITED STATES

VS.

GEORGE J. LEMAK  
EDGAR L. HUMBERSON

GEORGE J. LEMAK,  
Appellant

---

Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. Criminal No. 89-00039)  
District Judge: D. Brooks Smith

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Submitted Under Third Circuit rule 12(6)  
April 2, 1990  
Before: MANSMANN, SCIRICA and SEITZ  
Circuit Judges

(Filed April 4, 1990)

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MEMORANDUM OPINION OF THE COURT

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MANSMANN, Circuit Judge.

The appellant, George J. Lemak, asserts a claim of double jeopardy stemming from his 1989 conviction of willfully attempting to evade and defeat the assessment and payment of taxes owed for the calendar years of 1973-1975 by concealing assets in 1983 and 1984. He premises this argument on the fact that he was convicted in 1979 of a tax fraud charge based upon the same section relied upon in the 1989 conviction, 26 U.S.C. §7201. Because we find that the district court did not commit an error of law by denying Lemak's contention of double jeopardy based on the clear language of §7201, we will affirm the judgment of the district court.

I.

In 1979 Lemak was indicted on seven courts of violating 26 U.S.C. §7201<sup>1</sup> for the evasion of the assessment of tax for the years 1972-1975 and the defeat of payment of a large portion of the income tax due by signing a false and fraudulent tax return for those years. He pled guilty and was sentenced to a one year custodial sentence followed by a 5 year probationary period. In 1982, the Internal Revenue Service and Lemak arrived at an agreement for the liability owed for the years 1973-1975 whereby Lemak signed a document acknowledging his liability to be

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1. §7201 provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,00 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

\$462,747.44. This liability remained oustanding after the IRS levied upon Lemak's funds to meet the taxes, penalties and interest due for 1972. No voluntary payments were made by Lemak in 1983 or 1984.

Subsequently, in 1989, Lemak was indicted and convicted of 2 counts of violating 28 U.S.C. 7201 based upon his willful efforts to evade the payment of taxes for the calendar years 1973-1975 despite his ability to pay in 1983 and 1984. With co-defendant Edgar Humberson, he was also convicted on conspiring to evade the collection of the taxes for 1973-1975. Prior to trial, the district court denied both Lemak's Motion to Dismiss the Indictment because of double jeopardy and a Motion for Reconsideration of that denial. Founded upon his claim of double jeopardy, Lemak now appeals the district court's judgment of sentence and the denial of the Motion to Dismiss the Indictment.



## II.

Because there is no dispute as to the facts of this case, our review of the district court's selection, interpretation and application of the legal precepts applicable to a determination of double jeopardy is plenary. See Dent v. Cunningham, 786 F.2d 173, 175 (3d Cir. 1986). We rebut Lemak's argument that he is entitled to an evidentiary hearing to determine the issue of double jeopardy in the absence of any need for factual development. An evidentiary hearing is required only where there is a factual dispute. United States v. Young, 503 F.2d 1072, 1077 (3d Cir. 1974). Furthermore, the cases relied upon by Lemak are distinguishable on the facts. Both United States v. Inmon, 594 F.2d 352 (3d Cir.), cert denied, 444 U.S. 859 (1979) and United States v. Liotard, 817 F.2d 1074 (3d Cir. 1987) involved complicated fact situations concerning the determination of whether one or two conspiracies existed. We find no need here for an evidentiary hearing to determine

what is basically a legal question: whether Lemak has been placed in double jeopardy because of his 1989 conviction of §7201 violations.

Section 7201 contains two separate and distinct offenses as acknowledged by the Supreme Court--"willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax." Sansome v. United States, 380 U.S. 343, 354 (1965) (emphasis in original). While we have not addressed the double jeopardy issue involved with §7201, the Court of Appeals for the Ninth Circuit has addressed it in a case that is on all fours with the fact situation here.

In Cohen v. United States, 297 F.2d 760 (9th Cir. 1962), cert. denied, 369 U.S. 865 (1962), Cohen was convicted in 1951 of evading income taxes for the years 1946-1948. Subsequently, he was charged and convicted of attempting to evade and defeat the payment of income taxes for the years 1945-1950. The

court rejected Cohen's double jeopardy argument by pointing out the fact that the initial conviction occurred during the latter half of the 1940's, while the subsequent indictment and conviction involved activity which transpired during a period beginning October 10, 1955. The court relied upon this distinction, as well as the fact §7201 contains two offenses capable of transgression, in ruling that Cohen was not exposed to double jeopardy by his second trial and conviction. Id. at 770.

We find the reasoning of Cohen persuasive. Lemak bases his claim of double jeopardy on the argument that the tax deficiency for 1973-1975 provides the nucleus for the two indictments and subsequent convictions, however, the first indictment involved tax evasion activity which occurred in the 1970's while the second indictment involves totally separate efforts in the 1980's to conceal an ability to repay the tax liability due for the year 1973-1975. In

spite of Lemak's contention that the two indictments are so interrelated as to constitute the same offense, on the basis that §7201 contains two separate offenses and because the indictments cover activities of two differing time spans, no danger of double jeopardy exists here.

We will thus affirm the district court's September 19, 1989 Judgment and Probation/Commitment Order.

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TO THE CLERK:

Please file the foregoing opinion.

CAROL LOS MANSMANN

Circuit Judge

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

No. 89-3660

---

THE UNITED STATES

vs.

GEORGE J. LEMAK  
EDGAR L. HUMBERSON

George J. Lemak,  
Appellant

---

Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. Criminal No. 89-00039)  
District Judge: D. Brooks Smith

---

Before: MANSMANN, SCIRICA and SEITZ  
Circuit Judges

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JUDGMENT

This cause came on to be considered on  
the record from the United States District  
Court for the Western District of Pennsylvania  
and was submitted under the Third Circuit Rule  
12(6) on April 2, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered on September 19, 1989 be and the same is hereby affirmed.

No costs taxed.

ATTEST:

April 4, 1990

Clerk

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 89-3660

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THE UNITED STATES

vs.

GEORGE J. LEMAK  
EDGAR L. HUMBERSON

George J. Lemak,  
Appellant

---

SUR PETITION FOR REHEARING

Present: MANSMANN, SCIRICA and SEITZ,

Circuit Judges.

The petition for panel rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

BY THE COURT,

CAROL LOS MANSMANN

MAY 1 - 1990

Circuit Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
vs. : Criminal No.  
GEORGE J. LEMAK and : 89-39  
EDGAR L. HUMBERSON, :  
Defendants

ORDER

AND NOW, this 28th day of June,  
1989, upon consideration of defendant George  
J. Lemak's pretrial motion, and the  
government's omnibus response thereto, it is

ORDERED, that Defendant Lemak's Motion  
to Dismiss the Indictment Based on Double  
Jeopardy is denied; and it is further

ORDERED, that defendant's Motion to  
Dismiss the Indictment Because of Pre-Accusa-  
tion Delay is denied; and it is further

ORDERED, that Defendant, Lemak's Motion  
for Discovery and Inspection is granted as to  
Paragraphs One (1) through Seven (7); any  
discovery not completed by the date of this  
Order shall take place forthwith.

BY THE COURT

---

D. Brooks Smith  
United States District  
Judge

cc: Leo Dillon, AUSA

Vincent C. Murovich, Esq.  
100 Smithfield St.  
Pittsburgh, PA 15222

Robert J. Cindrich, Esq.  
20th Floor - Four Gateway Center  
Pittsburgh, PA 15222

## APPENDIX C

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

#### Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend V

Title 26 United States Code, 7201:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

# CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition for Writ of Certiorari was delivered by first class mail on the \_ 15 \_ day of June, 1990, upon the following persons:

Paul J. Brysh, Asst. U. S. Attorney  
633 U. S. Postoffice and Courthouse  
Pittsburgh, PA 15219

Solicitor General of the  
United States  
Department of Justice  
Washington, D.C. 20530

A handwritten signature in cursive script, appearing to read "Vincent C. Murovich, Jr.", written over a horizontal line.

Vincent C. Murovich, Jr.  
Attorney for the petitioner